UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

IN RE:	)	3:09-CV-009	3:09-CV-568	3:09-CV-605
	)	3:09-CV-014	3:09-CV-569	3:10-CV-191
	)	3:09-CV-048	3:09-CV-570	3:11-CV-217
TENNESSEE VALLEY	)	3:09-CV-054	3:09-CV-571	3:11-CV-574
AUTHORITY ASH SPILL	)	3:09-CV-064	3:09-CV-572	3:11-CV-575
LITIGATION	)	3:09-CV-114	3:09-CV-578	3:11-CV-581
	)	3:09-CV-491	3:09-CV-579	3:11-CV-582
	)	3:09-CV-495	3:09-CV-582	3:11-CV-588
	)	3:09-CV-496	3:09-CV-583	3:11-CV-589
	)	3:09-CV-497	3:09-CV-584	3:11-CV-590
	)	3:09-CV-504	3:09-CV-589	3:11-CV-591
	)	3:09-CV-517	3:09-CV-590	3:11-CV-596
	)	3:09-CV-529	3:09-CV-591	3:11-CV-603
	)	3:09-CV-550	3:09-CV-592	3:11-CV-604
	)	3:09-CV-553	3:09-CV-593	3:11-CV-605
	)	3:09-CV-554	3:09-CV-594	3:11-CV-606
	)	3:09-CV-555	3:09-CV-595	3:11-CV-607
	)	3:09-CV-563	3:09-CV-597	3:11-CV-612
	)	3:09-CV-564	3:09-CV-602	3:11-CV-613
	)	3:09-CV-565	3:09-CV-603	
	)	3:09-CV-566	3:09-CV-604	
	)		(VARLAN/GUYTON)	

ORDER

The above-captioned actions are a part of the Tennessee Valley Authority ("TVA") Ash Spill Litigation, which arose following the failure of a coal ash containment dike at TVA's Kingston Fossil plant (the "KIF plant") on December 22, 2008. The entire TVA Ash Spill Litigation currently encompasses more than 60 cases pending before the undersigned and involves more than 800 plaintiffs [*See* Doc. 517-1].[1] The Court has outlined the

[1]Unless otherwise specified, all docket entry notations contained herein are numbered according to the docket entry sheet in *Chesney, et al. v. TVA, et al.*, Case No. 3:09-CV-09.

extensive history of this litigation in a previous memorandum opinion and order [Doc. 515], but notes for purposes of the instant order that the Court granted motions by plaintiffs and TVA to consolidate and bifurcate the trials in this litigation into two separate phases [Doc. 407]. The Court ordered that Phase I would involve a single trial on issues and evidence relating to duty, breach, and dike-failure causation, and that the issues determined in Phase I would be binding on all parties to the litigation [*Id*. at 6]. Depending on the disposition of issues reached in Phase I, the Court ordered that Phase II would include individualized evidentiary hearings or proceedings to determine issues such as tract-specific causation and whether, and to what extent, each plaintiff is entitled to damages [*Id*. at 6–7]. Because of the individualized nature of the issues to be resolved in Phase II, the Court ordered that no Phase II proceeding would be binding on all parties and that the method of conducing the Phase II proceedings would be determined after the Court's disposition of the issues involved in Phase I [*Id*. at 7].[2]

The Court entered a memorandum opinion and order on August 23, 2102, disposing of the issues involved in Phase I [Doc. 515]. The Court found that specific nondiscretionary conduct on the part of TVA caused the failure of the coal ash containment dike at TVA's KIF plant on December 22, 2008, and that, but for the nondiscretionary conduct, the dike failure

[2]By stipulation of all parties and with approval of the Court, the record from Phase I was adopted as the record for Phase I in all of the above-captioned cases [*See*, *e.g.*, *Armes, et al. v. TVA*, Case No. 3:09-CV-491, Doc. 100]. By agreement of the parties, this record has also been adopted by the parties in all cases related to the TVA Ash Spill Litigation filed in this Court [*See*, *e.g.*, *Rivers v. TVA*, Case No. 3:11-CV-604, Doc. 10].

would not have occurred [*Id.*]. The Court determined that TVA will therefore be liable for damages to each plaintiff, provided each plaintiff is able to demonstrate, in the Phase II proceedings, entitlement to relief under claims of negligence, trespass, and/or private nuisance [*Id.*].

Regarding Phase II, the Court directed the parties to file briefs regarding the parties' recommendations for how the Court should conduct the Phase II proceedings [*Id.*]. In response to this directive, the Court received three proposals from three groups of plaintiffs [*see Chesney, et al. v. TVA*, Case No. 3:09-CV-09, Doc. 518; *Armes, et al. v. TVA*, 3:09-CV-491, Docs. 114, 116; *Turner, et al. v. TVA*, 3:09-CV-495, Doc. 121], as well as a proposal from TVA [Doc. 517]. While all of plaintiffs' proposals address referring the cases to mediation, certain plaintiffs formally moved the Court to refer their cases to mediation [Doc. 518]. TVA filed a response in opposition to this motion [Doc. 520], and these plaintiffs replied [Doc. 521]. The Court held a hearing concerning Phase II and mediation on Monday, November 19, 2012. At the conclusion of the hearing, the Court orally granted plaintiffs' motion for mediation and referred this litigation to mediation. This memorandum opinion and order memorializes the Court's reasoning for doing so.

After careful consideration of the parties' briefs and oral arguments, the Court determines that this litigation is one that could benefit from mediation and that it is appropriate to order mediation at this time. In making this determination, the Court has considered several factors, including TVA's opposition to mediation at this time as well as the parties' recognition of the benefits of mediation.

First, the parties are in disagreement as to how Phase II should proceed. TVA wants to try the nine *Chesney* plaintiffs first and then allow for an appeal before proceeding with any other cases. Some of the plaintiffs want to choose among the plaintiffs who will proceed to trial first and then use the proof from those trials in later proceedings, if possible. Other plaintiffs want to try the cases of those plaintiffs closest to the epicenter of the spill or have a bifurcated proceeding in which the Court would first hear expert testimony and determine the method for determining what properties could recover and then use a Special Master for individualized damage determinations. The Court finds there are positive and negative aspects of each Phase II proposal, but given the varied approaches, it would be beneficial to attempt mediation before one, or some combination, of these approaches is implemented.

Second, each of the Phase II proposals would take a significant amount of both the Court's and the parties' time and resources. The parties disclosed at the hearing that they envision the initial Phase II trial will take four to five weeks, which is longer than the Phase I trial. Even if not completely successful, mediation could have the effect of limiting the claims, issues, or plaintiffs involved in Phase II, and consequently contribute to a more efficient Phase II proceeding. Mediation at this time, therefore, would be in the interest of judicial economy and efficiency.

Third, mediation will not necessarily prolong this litigation. The Court is ordering that mediation be conducted within a relatively short time frame, which is set forth below. Thus, to the extent mediation is unsuccessful, Phase II would still commence within a reasonable time after the conclusion of Phase I, or at least not significantly later than it would absent a mediation effort.

Finally, while TVA argues that mediation is premature at this time for several reasons, the Court is cognizant that mediation can occur successfully at all stages of litigation, even complex litigation. Given the Court's many rulings on dispositive and non-dispositive issues and its Phase I ruling, the parties have a framework at this particular junction to undertake a meaningful mediation process. Also, it appears that the statute of limitations issue that TVA states would hinder mediation would exist regardless of whether the litigation proceeds to mediation or litigation. Moreover, although discovery has yet to commence or be completed for some of the cases, the parties can address this issue in the course of mediation.

Accordingly, pursuant to the discretion of the Court, 28 U.S.C. § 652(a), and Local Rule 16.4, Plaintiffs' Joint Motion for Reference of Cases to Mediation [Doc. 518] is **GRANTED** and the parties are hereby **ORDERED** to mediate this litigation in good faith within one hundred twenty (120) days of the entry of this order.[3] To the extent additional time is needed to complete a successful, or partially successful, mediation, the parties may move the Court for additional time within which to mediate. In addition, within thirty (30) days of the entry of this order, the parties shall **SUBMIT** a joint proposal regarding the selection of a mediator.[4] Within seven (7) days following the conclusion of the mediation, or within one hundred twenty-seven (127) days of the entry of this order, the mediator shall **FILE** a report with the Court stating the outcome of the mediation, as contemplated by Local Rule 16.4(m). If the parties are unable to completely resolve this litigation pursuant to mediation, they also shall so **REPORT** to the Court, along with any updates to their Phase II proposals, within one hundred twenty-seven (127) days of entry of this order, and the Court will then enter an order directing how Phase II will proceed. Hence, the Court **DEFERS** a ruling on how Phase II will proceed until it receives and considers the parties' reports on the outcome of mediation and any updates to their Phase II proposals.

---

[3]Pursuant to the Local Rules, "all parties, or party representatives, and any required claims professionals (e.g., insurance adjusters) shall be present at the Mediation Conference with full authority to negotiate a settlement." E.D. Tenn. L.R. 16.4(l). Failure to comply with this requirement "may subject a party to sanctions by the Court." *Id.*

IT IS SO ORDERED.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE

[4]To the extent the parties cannot agree on a mediator, the parties shall move the Court for the appointment of a mediator on or before this same deadline.